

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT
AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE
RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.**

FILED BY CLERK

SEP 15 2009

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0012-PR
)	DEPARTMENT A
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
STEVEN LEON WAGGONER,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20051781

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
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E S P I N O S A, Presiding Judge.

¶1 In this petition for review, Steven Waggoner challenges the trial court's denial of his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. On

review, we determine whether the court abused its discretion in doing so. *See State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990). Finding no abuse of discretion, we deny relief.

¶2 Following a jury trial, Steven Waggoner was convicted of possessing a narcotic drug and drug paraphernalia. The trial court sentenced him as a repetitive offender based on its finding that Waggoner had two historical prior felony convictions and imposed concurrent, presumptive terms of ten and 3.75 years' imprisonment for the offenses. This court affirmed the convictions and sentences on appeal. *State v. Waggoner*, No. 2 CA-CR 2005-0388 (memorandum decision filed May 15, 2007).

¶3 In his subsequent petition for post-conviction relief, Waggoner asserted his sentences are illegal because at least one of the prior convictions upon which the trial court had relied was not a historical prior conviction pursuant to A.R.S. § 13-105(22)(c).¹ He also contended the court had lacked jurisdiction of the case because the complaint had been untimely filed. Following a hearing, the court denied relief on Waggoner's first claim without specifying the basis for its ruling. The court took under advisement Waggoner's claim that it had lacked jurisdiction of the case and denied relief on that claim in a later minute entry ruling.

¹Significant portions of the Arizona criminal sentencing code have been renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes relevant to this case, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offenses in this case.

¶4 Rule 32.2(a), Ariz. R. Crim. P., provides that a defendant is precluded from raising claims in a Rule 32 proceeding that were “[r]aisable on direct appeal.” Both claims Waggoner raised in this post-conviction proceeding could have been raised on appeal. However, because subject matter jurisdiction “involves a court’s power to hear a case” and a judgment is void if the rendering court lacked jurisdiction of the case, objections to the lack of subject matter jurisdiction “can never be forfeited or waived.” *State v. Chacon*, 555 Ariz. Adv. Rep. 3, ¶ 5 (Ct. App. May 7, 2009), *quoting United States v. Cotton*, 535 U.S. 625, 630 (2002); *see also State v. Cramer*, 192 Ariz. 150, ¶ 16, 962 P.2d 224, 227 (App. 1998). The trial court did not abuse its discretion by denying relief on Waggoner’s first claim because that claim could have been raised on appeal. Nor does it fall within any of the exceptions to the rule of preclusion. *See* Rule 32.2(b). Accordingly, we address the merits of only his second claim.

¶5 First, however, we consider Waggoner’s contention that, because the state had “failed to adequately respond” to his petition for post-conviction relief, it “should have been precluded from making any arguments other than preclusion at the oral argument hearing.” To the extent this contention is appropriately raised in a petition for review, *see* Rule 32.9(c), it lacks merit. Waggoner asserts the trial court improperly allowed the state to file a supplemental response to his petition several days before the evidentiary hearing and after Waggoner had filed his reply in support of the petition. The court denied Waggoner’s motion to strike the supplemental response after the prosecutor explained her understanding that the court had “wanted more information” on certain issues.

¶6 A trial court has inherent authority to request argument from counsel on the issues before it. *See Aragon v. Wilkinson*, 209 Ariz. 61, ¶ 15, 97 P.3d 886, 891 (App. 2004) (“A court’s inherent authority may be defined as such powers as are necessary to the ordinary and efficient exercise of jurisdiction.”), *quoting Acker v. CSO Chevira*, 188 Ariz. 252, 254, 934 P.2d 816, 818 (App. 1997); *see also State v. Delvecchio*, 110 Ariz. 396, 400, 519 P.2d 1137, 1141 (1974) (trial court may “take those necessary measures to provide for the orderly disposition of criminal cases”). Moreover, Waggoner has not asserted he was prejudiced by the timing of the state’s filing of its supplemental response. And, as he concedes, Rule 32.6(d) allows the parties to amend Rule 32 pleadings upon leave of court for good cause shown. Waggoner has not established nor does the record show the trial court abused its discretion in denying Waggoner’s motion to strike the supplemental response.

¶7 As noted above, Waggoner contends the trial court lacked jurisdiction to hear this case because the complaint was untimely filed. Rule 4.1(b), Ariz. R. Crim. P., requires the state to promptly file a complaint after a person is arrested without a warrant. It provides further: “If a complaint is not filed within 48 hours from the time of [a defendant’s] initial appearance before [a] magistrate, the defendant shall be released from jail.” Waggoner’s initial appearance was held on April 25, 2005. The indictment and notice of supervening indictment were filed on May 3, 2005, and an interim complaint dated April 28, 2005, was filed on May 10, 2005.

¶8 Waggoner argues that Rule 4.1 constitutes a rule-made limitation period applicable to criminal offenses, and because a complaint was not filed against him within

forty-eight hours of his initial appearance, the state “lacked the power to prosecute [him] and the Court lacked the jurisdiction to convict and sentence [him].” The state argued that because the notice of supervening indictment filed on May 3, 2005, stated a complaint had been filed in justice court, an earlier complaint, “presumably in compliance with Rule 4.1,” must have been filed. But, it contended, even if there had been a Rule 4.1 violation, dismissal of the case had not been warranted.

¶9 In its order denying post-conviction relief, the trial court stated it would “not speculate as to [the] implied existence” of an earlier complaint, but it concluded any Rule 4.1 violation had not deprived the court of jurisdiction. It relied on *State v. Gilbert*, 105 Ariz. 475, 467 P.2d 63 (1970), and *State v. Godfrey*, 136 Ariz. 471, 666 P.2d 1080 (App. 1983), in which our supreme court and Division One of this court respectively held that violation of a defendant’s right to a timely initial appearance or arraignment did not require that criminal charges against a defendant be dismissed. See *Gilbert*, 105 Ariz. at 477, 467 P.2d at 65 (arraignment); *Godfrey*, 136 Ariz. at 473, 666 P.2d at 1082 (initial appearance).

¶10 Waggoner attempts to distinguish these cases on the ground that they “involve[d] arraignment issues, not timeliness of a complaint.” However, he fails to explain how the reasoning of those cases does not apply here. The court in *Godfrey* noted that Rule 4.1(a) “requires that an arrested person who is not brought before a magistrate within twenty-four hours be immediately released.” 136 Ariz. at 473, 666 P.2d at 1082. It concluded, however, that “the mere abuse of [the defendant’s] rights [did] not entitle him to a dismissal of the criminal action pending against him.” *Id.*, quoting *Gilbert*, 105 Ariz. at 477, 467 P.2d

at 65. Although Waggoner relies on Rule 4.1(b), that distinction is immaterial. Neither the release provision in 4.1(a) nor (b) operates to deprive the court of jurisdiction of the case. As the court noted in *Gilbert*, a defendant held “without preliminary hearing or arraignment for an unreasonable length of time” has other avenues to enforce the right of release afforded by the rule. 105 Ariz. at 477, 467 P.2d at 65. Waggoner has cited no authority for his contention that Rule 4.1 operates essentially as a rule of limitations and deprives a court of jurisdiction once an indictment is filed. *See State v. Rodriguez*, 205 Ariz. 392, n.1, 71 P.3d 919, 922 n.1 (App. 2003) (superior court generally has subject matter jurisdiction “over any criminal case in which the defendant is charged by indictment or information with a felony”). The trial court did not abuse its discretion by denying Waggoner’s claim for relief on this ground.

¶11 Although we grant the petition for review, we deny relief.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

PETER J. ECKERSTROM, Judge